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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. ~~801~~ 71

E. B. ARENDER, MARCUS N. STRONG, NEAL McEACHARN, JR., ET AL.,

Appellants,

vs.

KINGWOOD OIL COMPANY, SOHIO PETROLEUM COMPANY, GEORGE A. MITCHELL, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OF KINGWOOD OIL COMPANY AND SOHIO PETROLEUM COMPANY.

GEO. GUNBY,
JOHN B. HUSSEY,
Counsel for Appellees.

SUPREME COURT OF LOUISIANA

No. 40,441

SOHIO PETROLEUM COMPANY

vs.

V. S. & P. R. R. ET ALS.
(in concursus)

and

GEORGE R. SUMLIN
(Plaintiff and Appellant)

vs.

KINGWOOD OIL COMPANY ET AL.
(Defendant and Appellees)

AND 26 CONSOLIDATED CASES

STATEMENT OPPOSING JURISDICTION OF SUPREME COURT OF UNITED STATES AND MOTION TO DISMISS APPEAL.

Comes now Kingwood Oil Company and Sohio Petroleum Company and except to the jurisdiction of the Supreme Court of the United States in this cause, and respectfully

moves to dismiss the appeal taken by Plaintiffs-Appellants to that Honorable Court on the following grounds:

1

The Supreme Court of Louisiana was not properly requested to and did not pass on the question of the constitutionality of Act 157 of 1940.

> The constitutionality of Act 157 of 1940 was not questioned by Plaintiffs-Appellants either in their brief or oral argument before the Supreme Court of Louisiana, and the Honorable Supreme Court of Louisiana does not mention the question of the constitutionality of this statute in its decision of these cases.

2

Even if the issue of constitutionality of Act 157 of 1940 had been tendered to the Supreme Court of Louisiana, that Honorable Court could not have considered or passed on that question because the issue of constitutionality had not been tendered to the Trial Court and could not be considered on appeal.

Womack v. *Varnado*, 209 La. 1019, 16 So. 2d 825, appeal dismissed 323 U. S. 177, 88 L. Ed. 1558, 64 S. Ct. 1287;

Southern Enterprises v. *Foster*, 203 La. 133, 13 So. 2d 491;

Causey v. *Opelousas-St. Landry Securities Co.*, 193 La. 677, 188 So. 739;

Batts v. *Marthaville Mercantile Co.*, 193 La. 1072, 192 So. 721;

Succession of Fauchon, 179 La. 333, 154 So. 15;

Abbeville v. *Police Jury*, 207 La. 779, 22 So. 2d 62;

Moledoux v. *Maestri*, 197 La. 525, 2 So. 2d 11;

State v. *Banner Cleaners & Dyers*, 170 La. 76, 127 So. 320;

Godchaux Sugars, Inc. v. *Leon Boudreaux & Bros.*, 153 La. 685, 96 So. 532;
Stubbs v. *Bain*, 173 La. 544, 138 So. 96;
Stovall v. *Monroe*, 199 La. 195, 5 So. 2d 547;
State v. *Brady*, 28 So. 2d 297;
Hixson Funeral Home v. *State*, 33 So. 2d 754;
See also: 180 La. 800, 157 So. 520;
129 La. 243, 55 So. 778;
127 La. 73, 53 So. 432;
125 La. 863, 51 So. 1016;
125 La. 55, 51 So. 66;
50 La. Ann. 1358, 24 So. 809.

3

The first time the constitutionality of Act 157 of 1940 was questioned by Plaintiffs-Appellants was in their application for rehearing before the Supreme Court of Louisiana. Question of constitutionality first presented to State Supreme Court on rehearing comes too late for consideration by the United States Supreme Court.

St. Louis etc. R. R. v. *Shepherd*, 240 U. S. 240, 36 So. Ct. 274, 60 L. Ed. 622;
Forbes v. *Virginia State Council*, 216 U. S. 396, 30 S. Ct. 295, 54 L. Ed. 534;
Cochran Oil Company v. *Arnaudet*, (La.) 199 U. S. 182, 26 S. Ct. 41, 50 L. Ed. 143.

4

In an attempt to excuse their failure to tender the issue of the constitutionality of the statute prior to their application for rehearing in the Supreme Court of Louisiana, plaintiffs-appellants contend, in their Jurisdictional Statement, that the provisions of the statute were "first raised and resorted to by the Supreme Court of Louisiana in deciding the Appeal."

That is not correct. The decision of the Supreme Court of Louisiana merely affirmed a decision of the trial court in which the trial court invoked the same statute for the same purpose and with the same effect.

5

Plaintiffs-Appellants realize that the Supreme Court of Louisiana did not directly pass on the constitutionality of the statute, in evidence of which we respectfully invite this Honorable Court's attention to the motion filed by Plaintiffs-Appellants on February 24, 1953, after their application for rehearing was denied, in which they request the Supreme Court of Louisiana to amend its opinion to show that it did pass on the constitutionality of the statute.

6

The Supreme Court of the United States has already upheld the constitutionality of Act 157 of 1940:

Hunter Company v. *McHugh*, 202 La. 97, 11 So. 2d 495, appeal dismissed 320 U. S. 722, 64 S. Ct. 19, 88 L. Ed. 5.

WHEREFORE, Appellees, Kingwood Oil Company and Sohio Petroleum Company, respectfully move that the appeal prosecuted herein to the Supreme Court of the United States be dismissed at the cost of Appellants.

Respectfully submitted,

GEO. GUNBY,
By (S.) JOHN B. HUSSEY,
Attorneys for Kingwood Oil Company and Sohio Petroleum Company.